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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMEL FAULTRY,

Defendant and Appellant.

D072914

(Super. Ct. No. SCD267623)

APPEAL from a judgment of the Superior Court of San Diego County, Esteban Hernandez, Judge. Affirmed.

Lillian Hamrick, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Andrew Mestman and Minh U. Le, Deputy Attorneys General for Plaintiff and Respondent.

## INTRODUCTION

A jury convicted Jamel Faultry of seven counts of robbery at three wireless retail stores (Pen. Code, § 211;<sup>1</sup> counts 2–4 [Jamacha, May 30, 2016], counts 5–6 [Truxton, June 7, 2015], and counts 7–8 [Clairemont Mesa, June 27, 2016]). The jury acquitted Faultry of two counts of robbery from two other wireless retail stores in the same time frame (counts 1 [Balboa, May 27, 2016] and 9 [Chula Vista, June 28, 2016]). The court sentenced Faultry to 11 years in prison based upon the upper term of five years for count 2 and consecutive terms of one year each (one-third the middle term) for counts 3 through 8.

On appeal, Faultry contends the court abused its discretion and violated his due process rights in admitting testimony from two witnesses about his friendship with Terence Scott, who was identified as a coperpetrator of the robberies, because this amounted to prejudicial "guilt by association." We conclude the court did not abuse its discretion in determining the limited testimony of these two witnesses was relevant and was not more prejudicial than probative under Evidence Code section 352. Therefore, we affirm the judgment.

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise stated.

## BACKGROUND<sup>2</sup>

### A

#### *Wireless Retail Employment*

Scott was hired in April or May of 2015 to work at a wireless retail store in the Parkway Plaza mall in El Cajon. After a month or two, Scott was transferred to another wireless retail location on Jamacha Road. Scott was later transferred to a location on Truxton Road in Point Loma. Scott was eventually terminated.

When Scott first started working at the wireless retail store, he asked the manager to consider hiring Faultry. The manager previously interviewed Faultry, but did not offer him the job. Scott asked the manager to give Faultry a chance. Faultry was later hired in March 2016 by another manager, based on Scott's referral, to work at the wireless retailer's Jamacha Road location.

Faultry transferred to a store in National City. Faultry had problems with tardiness and compliance with the dress code. Faultry voluntarily left the company in April 2016.

### B

#### *Balboa Robbery*

Around closing time on May 27, 2016 an African-American man wearing a hoodie entered a wireless retail store on Balboa Avenue holding a gun. He told the store employee to go to the back room and open the safe where phone stock is kept. As he did so, a second man wearing a baseball cap entered the store. After the employee opened

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<sup>2</sup> We provide the factual background of the alleged crimes to place in context the challenged testimony.

the safe, they asked where the tracker was. When the employee said he did not know, they had the employee lie on the ground as they emptied the safe. They left through a rear entrance. About 30 high-end smart phones, ranging in price from \$649 to \$849 each, were taken. The loss to the store was over \$20,000.

Cell phone data from Faultry's phone showed it was active in Orange County during the time of the Balboa robbery on May 27, 2016. Geotags are embedded in photos taken by a phone and show the location of the phone when the photo was taken. In this case, geotags from photos in Scott's phone showed it was in Los Angeles at the time of the Balboa robbery.

## C

### *Jamacha Robbery*

Around closing time on May 30, 2016, a man entered the front door of a wireless retail store on Jamacha in El Cajon with a gun. He was dressed in black and wore a blue bandanna over his face, a cap or hood, and gloves. An employee ran to the back where the manager was working in a back office. The man pointed the gun at them and ordered three store employees to go into a bathroom and give him their phones. The man tried to disguise his voice. The employees heard the safe opening and closing.

Video surveillance showed a second suspect enter the back room of the store through a back door, typically known to employees for receiving packages or taking breaks. The door opens to a parking lot. The second man went to the sales floor where the cash drawer was located. When the employees came out of the bathroom, about

\$2,000 was missing from the cash drawer and 20 to 30 top-tier phones, which ranged in price from \$650 to \$850 each, were missing from the safe.

A tracker phone box is kept in the safe with other phones. It was marked with a sticker identifiable by employees. If the tracker is moved out of the safe, it will go off. The purpose is to track the location if it is taken during a robbery. Employees are trained about identifying the tracker phone and its purpose. The first man did not ask the employees how to open the safe and or where the tracker phone was. The tracker phone was left behind after the robbery.

One of the employees had previously worked with Scott at a wireless services store in National City for about six months. The employee had worked with Faultry at the Jamacha store for a few shifts about a month before the robbery. The employee did not recognize anyone during the robbery.

After the robbery, the employee saw a picture Scott posted on social media of Faultry wearing a child's watch, which was sold at the Jamacha store and was missing after the robbery. Adults do not typically wear them. The employee had never seen Faultry wear such a watch.

The store manager later heard Scott was being investigated and thought he may have robbed the Jamacha store because the mannerisms of the person with the gun were similar to Scott's as was the physical build of the person.

A district manager watched video of the robbery and felt it was an inside job because the individuals knew the layout of the store, did not take the tracker phone, and

knew which drawer to open for the cash. After viewing the video again, the district manager believed the first individual was Scott.

Cell phone tower data analysis showed Faultry's phone active in the neighborhood near Scott's home around 7:00 p.m. on May 30, 2016. The phone was then active in the area near the Jamacha wireless retail store around 8:00 p.m. It was activated again after 8:45 p.m. near Jamacha and traveled north to Orange County.

## D

### *Truxton Robbery*

On June 7, 2016, around closing time, two men entered the wireless retail store in Liberty Station on Truxton Road in the Point Loma area. A man wearing a hood, black sunglasses, a bandanna, black gloves, and a backpack with gray straps did most of the talking. Another man wore a camouflage backpack. One of the men pointed a gun at the employees, ordered them to get in the back, to get on the floor, not to look up, and to give the two men their phones. Then they locked the employees in the bathroom. Surveillance video showed the man with the camouflage backpack opening the safe by using the foot pedals and taking money out of the cash drawer. The men left through the back door toward a back corridor.

Scott worked at the Truxton store for about a month prior to the robbery. One of the employees who had worked with Scott thought the voice of the individual who spoke during the robbery sounded like Scott. The employee called 911 on his smart watch and later told police he thought one of the suspects was Scott. The employee also spoke to the wireless retailer's district manager. The employee did not say he suspected Scott.

However, when the district manager watched the video and heard the suspect's voice, he recognized Scott. The district manager believed the two suspects were current or former employees because they knew where the lights were, where the back door was, and how to get into the safe. They also only took the expensive phones in the safe and not the tracker.

Money was taken from the cash drawer and expensive phones ranging in price from \$600 to \$900 each, were taken from the safe. The total loss exceeded \$20,000. The tracker was left behind. The individuals did not ask about the tracker, how to open the safe, where the cash was located, or if there was a back door.

Faultry's phone was activated a few minutes after the Truxton robbery about five miles away from the store. According to cell tower data, the phone traveled north to the area near Scott's residence and then north along Interstate 5. Cell phone tower data also indicated Scott's cell phone was in the Point Loma area around the time of the robbery and traveled north to the area of his residence around the time Faultry's did so.

## E

### *Phone Sale*

Scott sold one of the phones stolen from the Truxton location to a game store on June 22, 2016. The store was located across the street from Scott's apartment complex. Video surveillance of the transaction showed two men who made the transaction. An employee recognized Faultry as one of the men who sold the phone. Faultry frequently came in with another person to sell a game or a phone. Faultry never did the trade himself, but employees of the game store saw money handed to him after a transaction.

He came in two or three times in the week before June 22. A second cell phone was traded in to the game store on June 24, 2016.

Faultry's phone was active on June 22, 2016, in the neighborhood of the game store around the time Faultry and Scott were selling the phone.



*Clairemont Mesa Robbery*

On June 26, 2016, an employee working at a wireless retail store in Clairemont Mesa noticed a gray or silver car slowly creeping back and forth along the curb in front of the store several times as the occupants of the car tried to look into the store. The employee knew some wireless retail stores had been robbed and she felt as though the two young African-American males in the car were staking out the store to see who was there. The employee tried to take a picture with her phone. The individuals in the car noticed her and drove off so quickly they hit a curb. She took a picture showing the car up on the curb. The occupants of the vehicle had their seats pulled back, so she could barely see their heads. As they drove off, the passenger looked back. The employee told the regional manager about the incident and sent him the photo.

The regional manager asked Scott's former supervisor to check Scott's social media accounts for photos of a similar car. The former supervisor sent a photo of a similar car from Scott's social media account along with a photo of Faultry. The former supervisor told the regional manager that Faultry was a former employee and Scott's friend.

The following day, on June 27, 2016, two men wielding guns entered the Clairemont Mesa wireless retail store just before closing time. One man wore a black hoodie, black pants, and black shoes with a red bandana covering his face and he carried

a black Jansport backpack. The other individual wore a black ski mask covering his face and had a backpack. The men ordered the two store employees into the back of the store and onto the ground. One of the men ordered an employee to get up to open the safe. The employee lay back down and the men grabbed all the phones. The individuals left through the front door after one of the individuals turned off all the lights and took money out of the cash drawer. All the expensive phones were taken. The tracker was not taken. A total of 19 phones valued at over \$12,000 were stolen along with \$293 in cash.

One of the employees had worked with Scott at the Truxton location for about a month. The employee thought he recognized Scott's voice during the robbery and reported his suspicion to his coworker as well as to the store and district managers before telling the police. The district manager reviewed the video and agreed one of the suspect's voices sounded like Scott.

Cell tower data from June 27, 2016 showed Faultry's phone active in the Clairemont Mesa area before the Clairemont Mesa robbery. After the robbery, Faultry's phone activated a cell tower location along Clairemont Mesa Boulevard, west of Interstate 805. The phone appeared to travel north again along Interstate 5 into Orange County. Call detail records for Scott's phone also showed cell site activation on Clairemont Mesa Boulevard around the time of the Clairemont Mesa robbery. Scott's phone also appeared to travel north along Interstate 5 into Orange County.

## G

### *Scott's Arrest*

Scott was arrested on June 28, 2016 at his residence. Before the arrest, officers observed Faultry's silver Acura on June 28, 2016 near a store across from the apartment complex where Scott lived. Faultry exited the store and left in his vehicle. Scott's Chevy Impala was located in the same parking lot where Faultry's vehicle was seen.

A cell phone box and an airsoft gun that looked like a handgun were found in the front seat of Scott's vehicle. A black Jansport backpack was found on the floorboard behind the driver's seat. Another phone box was found inside the backpack along with another bag. Officers found in the trunk a black beanie cap resembling a ski mask with cut-out eye holes, black work gloves inside the cap, and a gray backpack. Another phone box, a glass case, black work gloves, a black hat, a red bandanna, blue latex gloves, and a black windbreaker jacket with a hood were found in the gray backpack.

A box for a phone stolen on June 27 from the Clairemont Mesa store was found during a search of Scott's car. Several baseball caps were also found, including an all-black cap.

Faultry was identified as a likely contributor to DNA found on the ski mask recovered from Scott's car. Faultry was also identified as a highly likely contributor to DNA found inside the gloves, which were folded into the mask. Scott was identified as another contributor to DNA found in the gloves.

## H

### *Chula Vista Robbery*

Just before closing time on June 28, 2016, a man with a hat and a hoodie came into a Chula Vista wireless retailer, pointed a gun at an employee, and ordered him to go to the back of the store where he had the employee lie on the ground. The individual was on the phone when he entered the front door. He asked if anyone else was there. A second person entered with a bag and asked where the tracker was before saying he saw it. They emptied the safe taking approximately \$40,000 worth of cell phones and the tracker phone.

The manager who hired Faultry looked at a video of the Chula Vista robbery and felt he recognized Faultry as the person who took the phones from the safe. The same manager looked at videos of the Balboa and Clairemont Mesa robberies and identified Faultry as the suspect who took phones out of the safe during those robberies. The manager said he recognized Faultry's voice and shoes.

Around the time of the Chula Vista robbery on June 28, 2016, Faultry's phone was active in the Pacific Beach or Clairemont Mesa areas, then near Scott's residence, and later the cell tower evidence showed it traveled north near Carlsbad.

## I

### *Other Identification Testimony*

After one of the managers identified Faultry as a suspect during the investigations of the robberies and said Faultry and Scott were friends, a notification was sent to law enforcement officers county-wide to be on the lookout for Faultry related to the robberies

of several wireless retailers. The notification included photographs of both Scott and Faultry. Police officer A.T. heard a briefing about the robberies, saw the bulletin, and was shocked to recognize Faultry as someone with whom he attended high school. Officer A.T. and Faultry had taken classes together and had mutual friends. They kept in touch after high school on social media for some time, but eventually lost touch. Officer A.T. knew Faultry was in San Diego.

After reviewing videos of the robberies, Officer A.T. identified Faultry as one of the suspects in the Balboa, Clairemont Mesa, and Chula Vista robberies. Officer A.T. was not able to identify Faultry in videos of the Jamacha and Truxton robberies.

Officer A.T. accompanied officers to Faultry's home where they spoke to Faultry's father and brother. The officers showed Faultry's father and brother video from the robberies. Officer A.T. thought Faultry's father's demeanor changed visibly when he saw the videos. Faultry's brother called Faultry. Faultry's father took the phone and urged Faultry to surrender to police. Faultry was eventually arrested in Los Angeles.

J

*Testimony of S.T. and J.C.*

1

Prior to trial, Faultry sought to exclude the testimony of S.T. and J.C. contending it amounted to evidence of guilt by association because they could only testify regarding the closeness of the friendship between Faultry and Scott rather than provide information about the crimes. The People argued the evidence of Faultry's friendship with Scott and the fact they were with each other during the time of robberies was relevant. The court

allowed the testimony from S.T. and J.C. finding it was relevant and, after balancing the factors required under Evidence Code section 352, more probative than prejudicial. The court determined the testimony would not result in an undue consumption of time.

2

S.T., a girlfriend who lived with Scott when he was arrested, testified Scott drove a Chevy Impala and regularly carried a black Jansport backpack.

S.T. identified Scott and Faultry in the video from the second-hand game store. S.T. stated Faultry was Scott's friend and spent the night several times at the home S.T. shared with Scott. Faultry "hung out" with Scott "quite often, maybe a few times a week." S.T. said one could characterize Faultry as Scott's best friend. Sometimes when they went out together Scott would not return home that night.

S.T. said Faultry came to the house on June 28, 2016, the evening after Scott was arrested, around 8:45 p.m. He stayed about 10 minutes. He did not know Scott had been arrested and seemed surprised.

J.C., another woman who dated Scott from September 2015 until May 2016, said she met Faultry nine or 10 times when he would hang out with Scott. When J.C. had not heard from Scott, she reached out to Faultry on social media. Faultry told her Scott had been arrested.

## DISCUSSION

Faultry contends the court abused its discretion in admitting the testimony of S.T. and J.C. contending it was "guilt by association" evidence in violation of his due process rights. We disagree.

" 'Evidence Code section 352 requires the exclusion of evidence only when its probative value is *substantially* outweighed by its prejudicial effect. "Evidence is substantially more prejudicial than probative [citation] [only] if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." ' ' ' (*People v. Jones* (2013) 57 Cal.4th 899, 948.) In the context of Evidence Code section 352, " 'prejudicial' is not synonymous with 'damaging,' but refers instead to evidence that " 'uniquely tends to evoke an emotional bias against defendant" ' without regard to its relevance on material issues." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) The trial court has broad discretion in determining the admissibility of evidence under Evidence Code section 352. (*Jones*, 57 Cal.4th at p. 949.)

"We review claims regarding a trial court's ruling on the admissibility of evidence for abuse of discretion. [Citations.] Specifically, we will not disturb the trial court's ruling 'except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266.)

This is not a case involving gang membership, which courts recognize as potentially inflammatory and caution careful scrutiny even when the evidence is relevant to establish "some fact concerning the charged offenses." (See *People v. Albarran* (2007) 149 Cal.App.4th 214, 223, 223–224.) There was nothing inflammatory about the testimony of S.T. and J.C. that Scott and Faultry were friends and spent time together.

The testimony of S.T. and J.C. did not consume undue time and was not more prejudicial than probative. Their testimony provided evidence about the charged

offenses. For example, S.T. identified Faultry as the person who was with Scott when they sold a stolen phone at the game store. S.T. assisted with the identification of Scott's car and corroborated that there were evenings when Scott and Faultry would go out together and not return home.

In contrast to the cases cited by Faultry, the prosecution did not impermissibly attempt to establish guilt merely by his association with Scott. (See *People v. Galloway* (1979) 100 Cal.App.3d 551, 563 [invited jury to speculate about evidence never presented at trial based on association]; *People v. Chambers* (1964) 231 Cal.App.2d 23, 29 [defendant "probably fastened with vicarious responsibility" for conduct of codefendant absent evidence of concerted or conspiratorial action].) This is not a case where there was an issue of failure of severance and the jury was not informed Scott was separately convicted. They were instructed not to speculate about whether other participants in the crime were or will be prosecuted. We presume the jury followed the instructions of the court absent any contrary indication. (*People v. Gray* (2005) 37 Cal.4th 168, 217.)

There was ample independent evidence Faultry was involved in the crimes for which he was convicted. Faultry worked at the Jamacha location before the Jamacha robbery. The suspects appeared to know their way around the store and the individual who entered through the back door went directly to the cash drawer, opening only that door. Faultry's phone was active near the Jamacha store location in the minutes before and after the robbery. Additionally, Scott posted a photo to social media showing Faultry wearing a watch like one stolen from the Jamacha location.



At the Truxton location, the district manager thought the suspects were current or former employees based on their actions in the store. Faultry's and Scott's phones were active in the minutes after the robbery near the store and traveled toward Scott's residence. Faultry accompanied Scott to sell a phone stolen from the Truxton location.

Faultry was identified by his former classmate and a manager as participating in the Clairemont Mesa robbery. A black ski mask like one described in the Clairemont Mesa robbery was found in Scott's car and contained DNA highly consistent with Faultry. Again, Faultry's and Scott's phones were active in the area near the Clairemont Mesa robbery and showed they both traveled north to Orange County around the same time after the robbery.

The prosecution's argument that it was probable Faultry and Scott committed the crimes together based upon the fact they were friends, spent time together, and both worked for the wireless retail company whose stores were robbed "was not an appeal to find guilt by association, but rather was a proper argument based upon reasonable inferences the jury could draw from the evidence it had heard." (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 152.)

The jury did not paint Faultry with a broad brush of guilt based on his association with Scott. Instead, they took their job seriously, weighed the evidence of each charge carefully, and acquitted him of two counts of robbery even though there was some identification evidence placing him at the Balboa and Chula Vista robberies. Indeed, S.T.'s testimony about Faultry visiting Scott's residence on the night after Scott was

arrested, along with cell tower evidence, may have benefited Faultry by raising reasonable doubt as to whether he participated in the Chula Vista robbery.

We conclude there was no prejudicial abuse of discretion, under any standard, in admitting the testimony of S.T. and J.C. (*Chapman v. Cal.* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836–837.)

#### DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

IRION, J.